No. 89-1905

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WISCONSIN PUBLIC INTERVENOR, AND
TOWN OF CASEY,

Petitioners,

v.

RALPH MORTIER AND WISCONSIN FORESTRY/
RIGHTS-OF-WAY/TURF COALITION,

Respondents.

On Writ of Certiorari to the Wisconsin Supreme Court

BRIEF *AMICUS CURIAE* OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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INTEREST OF THE *AMICUS CURIAE*

This brief amicus curiae is filed pursuant to Rule 37 of the Rules of this Court on behalf of the more than 1700 local governments that are members of the National Institute of Municipal Law Officers (NIMLO).

NIMLO is a national organization comprised of municipalities and local government units, which are political subdivisions of states. NIMLO is operated by the chief legal officers of its members, variously called city attorney, county attorney, city or county solicitor, corporation counsel, director of law, and other titles. NIMLO has a compelling interest in issues that affect local governments.

The accompanying brief is signed by the municipal attorneys constituting the governing body of NIMLO, both on behalf of NIMLO and for the political subdivision of the state, territory, or commonwealth of which they are the authorized law officers.

The local government attorneys who operate NIMLO are responsible for advising local governments on the best methods of promoting the health, safety, and welfare of their citizens through the regulation of matters which are of genuine local and municipal concern. These attorneys also represent their governments in litigation resulting from the enforcement of such regulations.

In this case, the Wisconsin Supreme Court determined that the Town of Casey's pesticide ordinance was preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

NIMLO believes that the Wisconsin Supreme Court erred in its application of the federal test for preemption. This error will severely curtail the ability of local governments to use their police powers to foster and protect the health, safety and welfare of their residents. NIMLO, therefore, urges the reversal of the Wisconsin Supreme Court's decision.

Consent to the filing of this brief has been granted by both parties and copies of these letters have been lodged with the Court.

STATEMENT OF THE CASE

Amicus adopts the statement of the case and the facts as presented by Petitioners, Wisconsin Public Intervenor and Town of Casey.

SUMMARY OF THE ARGUMENT

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) is the primary federal law regulating pesticides. The Wisconsin Supreme Court, in the present case, held that FIFRA preempts the Town of Casey's pesticide ordinance. Amicus urges this Court to reverse the Wisconsin Supreme Court and find that FIFRA does not totally preempt local government regulation of pesticides.

Amicus asserts that the Wisconsin Supreme Court erred in its application of the federal preemption test. Congressional intent to preempt areas of traditional state regulation may not be presumed. *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 740 (1985). Local governments have a strong interest in protecting their residents from the potentially hazardous effects of pesticides. They are in the best position to guard against problems associated with pesticide use in their locality.

A congressional intent to preempt should not be inferred unless "the nature of the regulated subject matter permits no other conclusion, or [unless]... Congress has unmistakably so ordained." *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963). FIFRA, by its own terms, does not require that the sale and use of pesticides be regulated exclusively by the federal government. Moreover, based on FIFRA's ambiguous legislative history, it cannot be said that "Congress has unmistakably...ordained" the preemption of local government regulation.

Preemption should not be implied where it would both "significantly interfere with 'the separate spheres of governmental authority'" and have far-reaching consequences not intended by Congress. *Massachusetts v. Morash*, 109 S.Ct. 1668, 1675 (1989) (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19 (1987)). A finding that FIFRA was intended to totally preempt local government regulation of pesticides would significantly interfere with state sovereignty by preventing states from delegating their power to act in a matter concerning health, safety and welfare. The consequences of such a finding would be to eliminate local ordinances which presently serve to safeguard the ultimate consumers of pesticides. Amicus asserts that these consequences were neither intended nor envisioned by Congress.

ARGUMENT

FIFRA DOES NOT PREEMPT LOCAL REGULATION OF PESTICIDES.

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. Section 136 et. seq., is the primary federal pesticide statute. FIFRA regulates pesticide registration, labeling, storage, disposal and transportation.

The Wisconsin Supreme Court determined, in the present case, that the Town of Casey pesticide ordinance was preempted by FIFRA. The ordinance required any person seeking to apply pesticides in the Town to obtain a permit and post notices warning that an area had been treated with pesticides. Town of Casey, Washburn County, Wis., Ordinance No. 85-1 (1985). Amicus asserts that the court erred in its application of the federal preemption test.

Congressional intent to preempt requires a "clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 231 (1947). The same analysis is used for the preemption of local laws as is used for the preemption of state laws. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985).

Federal preemption analysis starts with the presumption "that Congress did not intent to pre-empt areas of traditional state regulation." *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 740 (1985). This presumption "provides assurance that 'the federal-state balance,' {citation omitted} will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

The regulation of pesticides has traditionally been an area of local concern.[1] Spraying crops and grass can have the unfortunate side

[1]See, e.g., *People ex. rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 683 P.2d 1150, 1152, 204 Cal. Rptr. 897 (1984) (citing Dunning, *Pests, Poisons and the Living Law: The Control of Pesticides in California's Imperial Valley* 2 Ecology L.Q. 633, 643-44, 668 (1972).) ("Pesticide usage was not regulated by the state but was regulated solely by the counties until after World War II.")

effect of contaminating food, lakes, streams and recreation areas. Local governments clearly have a strong interest in protecting their residents from the potentially harmful effects of pesticide use and are in the best position to know the particular problems associated with pesticide use in their locality. A locality's geography, previous exposure to chemicals, groundwater hydrology and climate may determine whether a certain chemical is dangerous.[2] Because of these local concerns, many municipalities have enacted ordinances to protect the health, safety and welfare of their residents.[3]

[2]Boulder, Colo., Rev. Code § 6-10-1(b) (1981) ("The City Council finds that the unique wind conditions in the city cause drift to occur during airborne applications of pesticides and that absent pre-application notification, airborne applications of pesticides constitute a nuisance."); See also *County of Mendocino*, 683 P.2d at 1152, quoting from a Mendocino County, California ordinance, "We find and declare that it is necessary to prohibit aerial application of phenoxy herbicides because of the dangers of drift, contamination of food and water and irrevocable harm to natural resources. The aerial application of phenoxy herbicides, in light of said dangers, threatens the right of the people of Mendocino County to be secure in their homes and enjoy the peaceful, undisturbed use of private property and public lands."

[3]See, e.g., Village of Oak Park, Ill. Code ch. 20, art. 10 (1981). The Village requires pesticide applicators to provide persons, who may be affected by pesticides, with information concerning pesticides to be applied and safety precautions which may prudently be taken before, during and after a pesticide application. Applicators must also provide the name and description of the pesticides to be applied, the known risks, and appropriate safety precautions for each pesticide application. The Village determined that this will increase public knowledge concerning the safe use of pesticides, and facilitate an informed choice concerning pesticide applications. Prior notice of a pending indoor pesticide application is also required. The Village determined that this will serve to alert those persons who have the potential to be exposed to pesticides for an extended period of time as well as serve to alert those residents who have acute allergic, toxic or otherwise harmful responses to exposure to certain pesticides. See also, Minneapolis, Minn., City Charter and Code of Ordinances § 230.30 (1976) (requiring warning flags, with the name of the person or company applying the pesticide, the date of application and a warning to children and pets, posted in areas of pesticide application; flags to remain in place for forty-eight hours after pesticide application); Portland, Or., Code § 21.24.050 (1984) (requiring specific

In areas that have traditionally been of local concern, such as pesticide use, federal preemption should not be found "in the absence of persuasive reasons--either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963).

FIFRA specifically indicates that the sale and use of pesticides is not subject to exclusive federal regulation. FIFRA expressly authorizes states to enact laws pertaining to the "sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by {FIFRA}." 7 U.S.C. § 136 v(a). The only areas that have been specifically preempted by FIFRA are the labeling and packaging of pesticides. 7 U.S.C. § 136 v(b).

FIFRA, by its own terms, leaves no question "that the nature of the regulated subject matter" does not require exclusive federal control. The remaining question, therefore, is whether "Congress has unmistakably...ordained" that local regulation should be preempted. The law is clear that "we are not to conclude that Congress legislated the ouster of {local regulations} . . . in the absence of an unambiguous congressional mandate to that effect." *Florida Avocado Growers*, 373 U.S. at 146-47.

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authorization from Portland Bureau of Water Works prior to connecting to the public water supply for the purpose of introducing chemicals for use as pesticides); Miami, Fla., Charter and Code art.IV, § 23-63 (1980) (prohibiting the possession of "restricted pesticides" set forth in the section); Jacksonville, Fla., Municipal Code § 364.105 (1970) (prohibiting the sale or use of insecticides with sodium fluoride, live-micro-organisms, sodium fluoracetate (compound 1080), thallium sulphate or thallium salt unless certain conditions are met); St. Louis, Mo., Rev. Ordinances § 623.040 (1974) (prohibiting the sale, possession or use of a pesticide containing dichlorodiphenyl trichloroethane (DDT)); Los Angeles, Cal., Municipal Code § 41.34, 57.101.22 (1936) (requiring that prior notice be given to the tenants of multi-family dwellings of the pest to be controlled, the pesticides to be used and their active ingredients; and regulating the storage, mixing or transporting of pesticides at any airport); and Wilmette Village, Ill., Code § 5-19 (1967) (requiring a municipal license prior to spraying of pesticides, prohibiting the use of persistent compounds of chlorinated hydrocarbons, prohibiting pesticide application when true wind velocity exceeds the ten miles per hour, and requiring warning poster signs 300 feet from the place of application.)

It is not disputed that FIFRA, while specifically permitting state regulation of the sale and use of pesticides, neither expressly permits nor prohibits local government regulation. The Wisconsin Supreme Court found, however, that congressional intent to preempt local government regulation of pesticides was implied because FIFRA's definition of "state" made no reference to local government. *Mortier v. Town of Casey*, 154 Wis. 2d 18, 24, 452 N.W. 2d 555, 557 (1990). While the court conceded that this omission, by itself, was ambiguous as to congressional intent, it determined that reference to FIFRA's legislative history made it "abundantly clear" that Congress intended to deprive states of the authority to delegate their power to regulate the sale and use of pesticides. *Mortier*, 154 Wis. 2d at 24-25, 452 N.W. 2d at 557-58.

This analysis is flawed. Lower courts are in conflict as to whether FIFRA's legislative history indicates a clear congressional intent to preempt local government regulations. The state supreme courts in Maine and California have reached the conclusion that FIFRA's legislative history does not preempt states from authorizing local governments to regulate pesticides.[4] The United States District Court for the District of Colorado also held that FIFRA's legislative history neither authorizes nor prohibits local regulation.[5]

Two federal courts have found that this same history preempts local governments from regulating pesticide use.[6]

FIFRA's history has been successfully used to both infer congressional intent to preempt as well as to infer congressional intent to leave to the states whether to delegate their power to regulate pesticides. Amicus asserts that this history can hardly be considered "an unambiguous congressional mandate" to preempt local regulations. Local governments should not, therefore, be deprived of their power to protect their residents' health, safety and welfare.

[4] *Central Maine Power Co. v. Town of Lebanon, Maine*, 571 A.2d 1189 (Me. 1990) and *People ex. rel. Deukmejian v. Mendocino County*, 36 Cal. 3d 476, 683 P.2d 1150 (Cal. 1984).

[5] *COPARR, Ltd. v. The City of Boulder*, 735 F. Supp. 363 (D. Colo. 1989).

[6] *Professional Lawn Care Ass'n v. Village of Milford*, 909 F.2d 929 (6th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3180 (U.S. Aug. 31, 1990) (No. 90-382) and *Maryland Pest Control Ass'n v. Montgomery County*, 646 F.Supp. 109 (D. Md. 1986), *aff'd without opinion*, 822 F.2d 55 (4th Cir. 1987).

Further supporting the conclusion that Congress did not intend to totally preempt local government regulation of pesticides are the effects that preemption would have on the sovereignty of state government and the consequences for the ultimate consumer of pesticides. In *Massachusetts v. Morash*, 109 S.Ct. 1668 (1989), the Court considered whether the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 833, as amended, 29 U.S.C. Section 1002(1), preempted state regulation of routine vacation benefits. The Court determined that the primary concern of Congress in enacting ERISA was the mismanagement of employee benefit funds. *Morash*, 109 S.Ct. at 1671. In finding against preemption, the Court said that state regulation of routine vacation benefits was not a concern of Congress in enacting ERISA and that a finding of preemption would place employees in a position of receiving less protection than under state regulations. *Id.* at 1675. According to the Court, "Absent any indication that Congress intended such far-reaching consequences, we are reluctant to so significantly interfere with 'the separate spheres of governmental authority preserved in our federalist system.'" *Id.* (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19 (1987)).

Amicus asserts that a finding of implied preemption will significantly interfere with state sovereignty and have far-reaching consequences not intended or envisioned by Congress. Congress enacted, and subsequently revised FIFRA to protect people and their environment from unsafe pesticides. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991-92 (1984). FIFRA, by its own terms, was only setting minimum regulations as to the sale and use of pesticides. States have historically had the authority to delegate matters of health, safety or welfare to local governments. In response to this state delegation of power, local governments have enacted ordinances to protect their residents against the inherent dangers of pesticide use. Such ordinances have required prior notice of pesticide applications, posting warning notices of pesticide use, authorization from municipal water works departments prior to introducing pesticides into the water supply, and have prohibited the possession or use of certain pesticides.[7] A finding

[7]See, e.g., ordinance listed in footnote 3.

of implied preemption would have the effect of eliminating these local ordinances thereby preventing municipal residents from taking precautions to minimize or eliminate the dangers resulting from local pesticide use. In light of the congressional concerns which led to the enactment of FIFRA, Congress cannot be said to have intended these far-reaching consequences.

FIFRA's ambiguous history coupled with the strong presumption against implied preemption inexorably leads to the conclusion that the Supreme Court of Wisconsin erred in finding that FIFRA totally preempts local government regulation of pesticides.

CONCLUSION

For the foregoing reasons it is urged that this Court reverse the decision of the Wisconsin Supreme Court.

Respectfully submitted,

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